

1 LUKE W. COLE, California Bar No. 145,505  
2 CAROLINE FARRELL, California Bar No. 202,871  
3 BRENT J. NEWELL, California Bar No. 210,312  
Center on Race, Poverty, & the Environment  
4 450 Geary Street, Suite 500  
San Francisco, CA, 94102  
415/346-4179 • fax 415/346-8723

5 NANCY S. WAINWRIGHT, Alaska Bar No. 8711071  
Law Offices of Nancy S. Wainwright  
6 13030 Back Road, Suite 555  
Anchorage, AK 99515-3538  
7 907/345-5595 • fax 907/345-3629

8 Attorneys for Plaintiffs Enoch Adams, Jr., Leroy  
9 Adams, Andrew Koenig, Jerry Norton, David  
Swan and Joseph Swan

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

13 ENOCH ADAMS, JR., LEROY ADAMS,  
ANDREW KOENIG, JERRY NORTON  
14 DAVID SWAN and JOSEPH SWAN.

Case No. A04-49 (JWS)

15 || Plaintiffs,

## PLAINTIFFS STATUS REPORT

16 || v.

17 | TECK COMINCO ALASKA INCORPORATED

18 || Defendant.

19 NANA REGIONAL CORPORATION and  
20 NORTHWEST ARCTIC BOROUGH,

## 21 || Intervenors-Defendants.

24        This status report is filed by the plaintiffs in response to the court's September 13, 2006  
25 order. As noted in the defendants' separately-filed status report, the parties continue to be  
26 interested in attempting to mediate all of plaintiffs' claims in this action. They have jointly  
27 identified potential mediators and are scheduled to interview four candidates between December  
28

**PLAINTIFFS STATUS REPORT**

1 18-20, 2006 in San Francisco and Seattle. The parties intend to confer shortly after these  
2 interviews to attempt to agree on a single mediator. During the interviews they intend to discuss  
3 the mediator's availability for mediation as early as the latter half of January, 2007, the parties  
4 being interested in proceeding to mediation without any unnecessary delay. One of the  
5 candidates to be interviewed has already advised his mediation schedule does not allow for a  
6 mediation of this complexity in January. The parties will be exploring the earliest alternative  
7 dates with this candidate during his interview.

8       The parties suggest supplementing this status report on or before January 5, 2007. They  
9 anticipate they will be able to advise the court by that time if they have agreed on a mediator and  
10 the time set for the mediation.

11       Although the Court requested a joint status report, defendants unilaterally filed their  
12 report. Defendants' counsel circulated a draft "Joint Status Report" at 6:10 pm on December 7,  
13 2006. At 11:00 am on December 8 (today), plaintiffs okayed that joint report (which is  
14 substantially identical to the report filed by Defendants and the two paragraphs above), provided  
15 that the report include the following paragraph:

16       Plaintiffs continue to be concerned that Teck Cominco has not fully complied with its  
17 ongoing duty to supplement discovery under Rule 26. Plaintiffs position is as follows: On  
18 August 18, 2006, all parties filed a joint status report, which included the following  
19 statement: "The parties recognize their ongoing duties to supplement initial disclosures  
20 and responses to discovery requests. The parties propose a deadline of September 30,  
21 2006 to update all disclosures and responses to discovery, as required under the civil  
22 rules, to that date. This date allows time for the parties to review the supplemental  
23 disclosures and discuss them with their experts before mediation, as described below."

1       Although the Court did not address this issue in its Order on Trial of September 13, 2006,  
2       in good faith Plaintiffs provided Teck Cominco with supplemental responses to discovery  
3       requests on September 30, 2006. Teck Cominco did not supplement its discovery  
4       disclosures until November 14, 2006, and still has not fully complied with its duty to  
5       supplement discovery. Specifically, Teck Cominco has not provided Plaintiffs with an  
6       update to Request for Supplemental Disclosure 7a, the internal Teck Cominco accounting  
7       of its environmental violations; this Court may remember the internal documents, which  
8       were the subject of an earlier motion to compel and this Court's Order of November 3,  
9       2005, ordering their disclosure to the plaintiffs. It is Plaintiffs position that Teck  
10      Cominco's failure to timely provide this discovery has delayed the mediation because it  
11      has not allowed Plaintiffs to fully prepare for such mediation. Plaintiffs are concerned  
12      that Teck Cominco is trying to delay the mediation until the issuance of Teck Cominco's  
13      new EPA permit as a litigation tactic.

16      At 4:17 pm today, Teck Cominco served, by electronic mail, 29 new discovery documents  
17      comprising more than 175 pages, apparently in an effort to comply with its duty to provide  
18      supplemental discovery responses. At 4:54 pm, plaintiffs counsel was informed by electronic  
19      mail that defendants had unilaterally filed a "defendants' status report," and at 5:04 pm,  
20      defendants' counsel Larry Hartig informed plaintiffs' counsel "I changed the draft status report to  
21      state it is only being filed by defendants. I figured it would take you awhile to get through the  
22      reports we sent to you this afternoon and make a decision on what you want to state in a status  
23      report." Plaintiffs counsel has not had time to review the discovery documents to determine their  
24      responsiveness, but observes that it is more than 60 days after the deadline both parties  
25      represented to the Court they would supplement their discovery responses.  
26  
27  
28

1 Plaintiffs look forward to the opportunity to try to mediate this case, but hope that  
2 defendants will show better faith in the mediation than they have in complying with their  
3 discovery duties. As noted above, plaintiffs fear that Teck Cominco's dilatory tactics are an  
4 attempt to draw out the mediation process until EPA has issued a new permit, to try to secure  
5 some litigation advantage in this suit. We note this fear so that the Court can keep close track of  
6 the mediation process and ensure that it occurs in a timely and good faith manner.  
7  
8

9 Respectfully submitted this 8th day of December, 2006.  
10  
11

12 \_\_\_\_\_ /S/  
13 Luke Cole  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Attorney for Plaintiffs

1     CERTIFICATE OF SERVICE

2     I hereby certify that on the 8th day of December, 2006,  
3     a true and correct copy of the foregoing was served,  
4     via electronic mail, on the below identified parties of  
5     record:

6         Larry Hartig  
7         Hartig Rhodes  
8         717 K Street  
9         Anchorage, AK 99501

10      Nancy S. Wainwright  
11      Law Offices of Nancy S. Wainwright  
12      13030 Back Road, Suite 555  
13      Anchorage, Alaska 99515-3538

14      James E. Torgerson  
15      Heller Ehrman White & McAuliffe LLP  
16      510 L Street, Suite 500  
17      Anchorage, Alaska 99501-1959

18      David S. Case  
19      Landye Bennett Blumstein LLP  
20      701 W. 8<sup>th</sup> Ave., Suite 1200  
21      Anchorage, AK 99501

22                    \_\_\_\_\_  
23                    /S/  
24                    \_\_\_\_\_  
25      Luke Cole  
26  
27  
28